SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000384-001 DT 01/25/2006

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
L. Rasmussen
Deputy

FILED: 01/26/2006

DEBORA TOWNSEND

CORWIN A TOWNSEND

v.

STATE OF ARIZONA (001)

RANDY D DELGADO

OFFICE OF ADMINISTRATIVE HEARINGS

RULING

Plaintiff Debora Townsend (hereafter, "plaintiff" or "Townsend") appeals from a decision by defendant Arizona Department of Real Estate (hereafter, "Department") denying her application for a real estate salesperson's license. This court has jurisdiction pursuant to the Administrative Review Act, A.R.S. §§ 12-901, *et seq*. The court has considered the record from the administrative agency, as well as the memoranda submitted. Counsel waived oral argument.

Factual and Procedural Background

On October 24, 1997, plaintiff was arrested for manslaughter and leaving the scene of a fatal collision. She was indicted on February 12, 1998. Count one of the indictment charged her with manslaughter, a class 2 dangerous felony. Count 2 alleged leaving the scene of a fatal accident, a class 3 felony. After a jury trial, plaintiff was convicted of both charges. On the manslaughter charge, she was sentenced to three years in prison, ordered to pay restitution, and directed to serve a term of community supervision upon her release from prison. Plaintiff received two years' supervised probation for the second charge.

Plaintiff filed an application for a real estate salesperson's license with the Department on October 7, 2004. By letter dated December 6, 2004, the Department notified plaintiff of its intent to deny her application based on her felony convictions. Plaintiff filed a timely notice of appeal. The Department issued a Notice of Hearing dated January 4, 2005. Administrative Law Judge (hereafter, "ALJ") Allen Reed presided over an evidentiary hearing on February 8, 2005. He thereafter issued findings of fact, conclusions of law, and a recommended order. The ALJ recommended denial of plaintiff's application. The Department's Real Estate Commissioner

adopted the ALJ's findings, conclusions, and recommended disposition. Plaintiff filed a motion for rehearing, which was denied. She thereafter filed a timely complaint for administrative review in this court.

Analysis

A.R.S. § 12-910(E) defines the scope of judicial review in these proceedings:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

In determining the propriety of an administrative agency's action, the court reviews the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Petras v. Arizona State Liquor Board,* 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), *quoting Tucson Public Schools, District No. 1 of Pima County v. Green,* 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). The appellate court views the evidence in the light most favorable to upholding the agency's decision and will affirm if the decision is supported by any reasonable interpretation of the record. *See Baca v. Arizona Dept. of Economic Security,* 191 Ariz. 43, 951 P.2d 1235 (App. 1998). The court does not function as a "super agency" and may not substitute its own judgment for that of the agency where factual questions and agency expertise are involved. *See DeGroot v. Arizona Racing Comm'n,* 141 Ariz. 331, 686 P.2d 1301 (App. 1984). This court, however, is not bound by an agency's conclusions of law or statutory interpretations. *Siegel v. Arizona State Liquor Board,* 167 Ariz. 400, 807 P.2d 1136 (App. 1991).

Plaintiff contends that the Department erred in denying her motion for rehearing. That motion, dated April 5, 2005, requested rehearing so that plaintiff could introduce a letter dated December 15, 1998 from neurologist William Grainger. The Department denied plaintiff's motion in a written order dated April 26, 2005.

The grounds for a new hearing are set forth in A.A.C. R4-28-1310(B). Plaintiff claimed surprise, pursuant to A.A.C. R4-28-1310(B)(3) and newly-discovered evidence, pursuant to A.A.C. R4-28-1310(B)(4). In denying plaintiff's motion, the Department implicitly found that the stated grounds did not justify rehearing. This court concurs. The "newly-discovered evidence" standard is clearly inapplicable. The letter at issue is dated December 15, 1998 – over six years before the administrative hearing occurred. Plaintiff was clearly aware of Dr.

Grainger's opinion. He testified at her criminal trial, and she referenced his testimony and opinions in her September 28, 2004 letter to the Department.[1]

Nor does the record support plaintiff's claim that she was unfairly surprised by the questions about her conduct leading to the criminal charges. Plaintiff knew from the date she filed her application that her felony convictions were something that the Department considered relevant. Additionally, the Notice of Hearing dated January 4, 2005 was extremely detailed. In addition to reciting the procedural and factual background of the criminal proceedings against plaintiff, the notice stated:

> 13. Townsend has been convicted in a court of competent jurisdiction in Arizona of two felonies, including a crime of moral turpitude, in violation of A.R.S. § 32-2153(B)(2).
>
> 14. Townsend's actions and convictions referenced above show that she is not a person of good character, in violation of A.R.S. § 32-2153(B)(7).
>
> 15. Townsend violated Arizona state laws that involve violence against another person, in violation of A.R.S. § 32-2153(B)(10).
>
> 16. Grounds exist to deny Townsend's application for a real estate salesperson's license under A.R.S. § 32-2153(B)(2), (B)(7) and (B)(10).

Based on the Notice of Hearing, it was clear that both the conduct leading to the criminal convictions and plaintiff's character were issues to be considered at the hearing. The Department's Proposed List of Witnesses & Exhibits, dated January 27, 2005, also made this point clear by listing the following hearing exhibits:

- Incident Report, Tempe Police Department No. 97-148261. (Certified)[2]
- Incident Report, Tempe Police Department No. 97-148320. (Certified)
- Indictment, *State of Arizona v. Debora Amparo Cota Munoz*, Maricopa County Superior Court No. CR98-90792, filed February 12, 1998. (Certified)
- Presentence Report, filed February 4, 2000. (Certified)
- Judgment and Sentencing Order, dated February 11, 2000. (Certified)
- Order of Discharge From Probation, dated August 5, 2003. (Certified)
- Certificate of Absolute Discharge, dated October 1, 2004.

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[1] Plaintiff states in that letter, *inter alia*:

> I believe and my Neurologist, Dr. William Grainger, testified at trial, that I had an Epileptic Seizure at that every moment.

[2] Plaintiff had provided copies of these police departments to the Department as part of her license application.

A "Hearing Memorandum" submitted by plaintiff herself discussed in great detail her convictions and why she believed that they should not disqualify her from licensure. Plaintiff also submitted letters of reference attesting to her character.

Any surprise that plaintiff claims to have suffered could have been avoided through the exercise of ordinary prudence. *See* A.A.C. R4-28-1310(B)(3). The Department did not err in denying plaintiff's motion for rehearing.

In addition to the felony convictions as a relatively clear-cut basis for licensure denial, the ALJ found that plaintiff's lack of candor at the hearing formed a separate basis for denial. After considering the testimony and evidence presented, the ALJ concluded that plaintiff had lied to police at the time of the incident and that she had not been completely honest and forthright in her testimony at the administrative hearing. He stated:

> It is evident from the record of this hearing that [plaintiff] was not being completely honest and forthright in her testimony at the hearing because she was attempting to deny facts of the accident as she knew them at the time. The fact the Petitioner may have panicked after realizing what had happened in 1997 is understandable. The fact that she is testifying in 2005 that she did not know what happened at the time of the accident and therefore left the scene making no attempt to assist the victim, is considered false testimony.

Certainly there can be no surprise that a trier of fact weighs and assesses witness credibility. Appellate courts accord substantial deference to a fact-finder's credibility determinations. *See, e.g., In re Estate of Shumway*, 197 Ariz. 57, 3 P.3d 977 (App. 1999). In the case at bar, the record supports the ALJ's finding. Plaintiff has provided several different stories regarding the events of October 24, 1997. She first professed ignorance of any accident involving her vehicle. After she was placed under arrest, plaintiff then stated that she was driving home when the accident occurred and that, "I didn't see him [the victim] until he was on my hood."[3] Yet in her September 28, 2004 letter to the Department, plaintiff stated that, "When the accident occurred, I was unconscious."

Finally, plaintiff's due process arguments are without merit. Plaintiff was provided with detailed notice of the charges and a full and fair opportunity to present her position.

Conclusion

Substantial evidence supported the finding that plaintiff's licensure was inappropriate pursuant to A.R.S. § 32-2153(B)(2) and A.R.S. § 32-2153(B)(7). The Department's refusal to

[3] Plaintiff also stated in a police interview: "I hit the curb and went up on the sidewalk and then it twisted around and I was facing the other way. I didn't see him until he was on the hood."

license plaintiff was not "unreasoning action."[4] Its decision was "exercised honestly and upon due consideration."[5] At most, there is "room for two opinions."[6] The Department's decision is supported by substantial evidence and is not contrary to law, arbitrary, capricious, or an abuse of discretion.

IT IS ORDERED affirming the decision of the Arizona Department of Real Estate. Plaintiff's requested relief is denied.

/s/ *Margaret H. Downie*
HON. MARGARET H. DOWNIE

[4] *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981).
[5] *Id.*
[6] *Id.*